

LETTER OPINION
98-L-61

May 6, 1998

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Dear Mr. Vogelpohl:

Thank you for your letter requesting my opinion regarding the continued qualification for office of the Mayor of the city of Lincoln. Your letter provides the following facts:

The Lincoln Mayor, as a result of a recent divorce, has obtained dwelling quarters in Bismarck. The Mayor's ex-wife continues to occupy the former couple's Lincoln home, in which the Mayor and his ex-wife retain ownership interests the same as prior to the divorce. The Mayor continues to keep certain of his possessions at the Lincoln home. The Mayor has indicated that he has stayed periodically at the Lincoln home since the divorce during the course of his performing repairs and routine maintenance to such house, which repair and maintenance obligation is continuing. He has indicated that he anticipates that he may additionally be staying at the Lincoln home, in his ex-wife's absence, while caring for the former couple's three children, of which he and his ex-wife have joint custody. He has indicated that he is in contact with a realtor for the purpose of seeking and obtaining separate dwelling quarters in Lincoln and he states that he intends to obtain such a dwelling when one is found suitably priced to his financial situation, which is distressed as a result of the divorce but improving.

You also indicated, in response to our inquiry, that the Mayor has a key to the Lincoln home in which his ex-wife is living.

You ask several questions, the first few of which relate to N.D.C.C. §§ 40-08-14 and 40-13-01. N.D.C.C. § 40-08-14 provides that a person must be "a qualified elector within the city" to qualify to be mayor. With regard to municipal offices generally, the first sentence in N.D.C.C. § 40-13-01 provides "[n]o person shall be eligible to hold an elective municipal office unless he is a qualified elector of the

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municipality and unless he has been a resident thereof for at least nine months preceding the election." You ask, in effect:

Does the first sentence in § 40-13-01 apply to the mayor, thereby requiring the mayor to be a "resident" as well as a "qualified elector" of the city? What criteria must a person meet in order to be a "resident" of the city within the meaning of the first sentence of N.D.C.C. § 40-13-01? Does § 40-13-01 require the mayor to continue to be a "resident" of the city to remain qualified to be mayor?

In Dietz v. City of Medora, 333 N.W.2d 702 (N.D. 1983), a Medora city resident and elector challenged the qualifications of the city mayor and a city council member to serve as city officers based on the contention that they were not residents of the city of Medora. The North Dakota Supreme Court, in Dietz, considered N.D.C.C. §§ 40-08-14 and 40-13-01, and suggested that there may be a conflict between those two sections because N.D.C.C. § 40-08-14 requires the mayor to be a qualified elector and N.D.C.C. § 40-13-01 appears to require that the mayor be both a qualified elector and an actual resident of the city.¹ In Dietz, the North Dakota Supreme Court did not need to address the possible conflict between N.D.C.C. § 40-08-14 and 40-13-01 because the mayor in that case happened to be both a qualified elector and an actual resident of the city. It is my opinion that N.D.C.C. §§ 40-08-14 and 40-13-01 do not conflict, but should be read together to conclude that a mayor must be both a "qualified elector" and an "actual resident" of the city.

Thus, it is my opinion that N.D.C.C. § 40-13-01 applies to a city mayor, thereby requiring the mayor to be both a "qualified elector" and a "resident" of the city. It is my further opinion that the term "resident" as used in N.D.C.C. § 40-13-01 refers to an "actual resident." "A person may have two or more actual residences, as distinguished from his single, legal residence." Dietz, 333 N.W.2d at 704. In discussing the residences of the mayor and council member in Dietz, the North Dakota Supreme Court stated:

Tjaden is a division manager employed by the Gold Seal Company to oversee Gold Seal's property and tourist facilities in Medora. When in Medora, Tjaden lives in a house provided by the Gold Seal Company. During September through March, Tjaden spends much of his time traveling for business purposes.

¹ To be a qualified elector, a person must be a "legal resident." See N.D. Const. art. II, § 1, N.D.C.C. §§ 16.1-01-04 and 54-01-26, and Dietz, 333 N.W.2d at 704-705.

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Connell is the majority owner of the Hitching Post, a Medora business which is open throughout the year. When in Medora, Connell lives in the living quarters above the family business.

Recently Tjaden and Connell purchased homes in Bismarck and Dickinson respectively.

. . . .

In the instant case both Tjaden and Connell have two actual residences, Tjaden in Medora and in Bismarck and Connell in Medora and in Dickinson. Tjaden and Connell are "residents" of Medora for purposes of §§ 40-08-05 and 40-13-01, N.D.C.C. [i.e., actual residents], if they live, reside, or dwell in Medora. Both have living quarters in Medora where they keep personal possessions, clothing, furniture, and items of sentimental value. These living quarters are the dwelling places of Tjaden and Connell whenever they are in Medora. It is not necessary that Tjaden and Connell spend every day of the year in Medora to be [actual] "residents thereof."

Dietz, 333 N.W.2d at 703-704.

It is my opinion that the criteria a person must meet in order to be a "resident" of the city within the meaning of N.D.C.C. § 40-13-01 are the same criteria as those expressed in Dietz, as quoted above, that are required to be an "actual resident." It is my further opinion that a mayor must continue to be a "qualified elector" and an "actual resident" of the city in order to remain qualified to be mayor.

Your second question involves the meaning of N.D.C.C. § 40-13-07. This section provides: "When any officer removes from a municipality . . . the office shall be deemed vacant." You ask what the phrase "removes from a municipality" means. It is my opinion that the quoted phrase in N.D.C.C. § 40-13-07 means that when an officer is no longer an "actual resident" of the municipality, the office shall be deemed vacant. As the Dietz case indicated, "[a] person may have two or more actual residences, as distinguished from his single, legal residence." Dietz, 333 N.W.2d at 704. The key question in determining whether the Mayor has removed from the city of Lincoln, is whether the Mayor continues to have an "actual residence" in the city of Lincoln. My response to your first few questions indicated that one must rely on the criteria indicated in the Dietz case in

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order to determine whether a person is an "actual resident" of a city.

Finally, you ask whether one must resort to a lawsuit, or whether there is some other procedure, to determine a person's qualification for office or to determine the vacancy or lack of vacancy in the office of mayor, particularly with regard to residency qualifications. N.D.C.C. § 40-08-02 states: "The city council shall be judge of the election and qualifications of its own members." A city council is composed of the mayor and council members. N.D.C.C. § 40-08-01. Thus, it is my opinion that if the issue of a council member's qualifications is raised with the city council, the city council has the duty to determine whether the mayor is still an "actual resident" of the city of Lincoln.² See N.D.C.C. § 40-08-02. In addition, N.D.C.C. § 44-02-01 states that "[a]n office becomes vacant if the incumbent shall . . . [c]ease to possess any of the qualifications of office prescribed by law" Thus, one need not resort to a lawsuit, but instead, may raise the issue with the city council, which shall then determine whether the mayor continues to be an "actual resident" of the city of Lincoln.

In making its determination whether the Mayor remains an "actual resident" of Lincoln, the city council should consider such factors as whether the Mayor 1) has the freedom to stay overnight at the Lincoln home without needing to obtain prior approval from his ex-wife, 2) keeps personal possessions in the Lincoln home, and 3) dwells at the Lincoln home whenever he is in Lincoln; or 4) otherwise has a living or dwelling place in Lincoln available to him without restriction and where he is not simply a guest. In addition to the facts of the Mayor's situation related in this opinion, there may be additional facts for the council to consider when determining whether the Mayor remains an "actual resident" of Lincoln. In the final analysis though, in order to remain an actual resident of Lincoln, it is necessary that the Mayor at least, at times, live, reside, or dwell in Lincoln.

Sincerely,

² The North Dakota Supreme Court, in Nelson v. Gass, 146 N.W. 537 (N.D. 1914), determined that N.D.C.C. § 40-08-02 did not authorize a city council to determine an election contest over the office of mayor. It is my opinion that this conclusion in the Nelson case is limited to election contests, and that N.D.C.C. § 40-08-02 still authorizes a city council to determine the qualifications of its members, including the mayor.

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